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BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL )  
DEVELOPMENT PERMIT DENIED BY )  
SNOHOMISH COUNTY TO )  
D. D. GRAHAM, )  
D. D. GRAHAM, )  
Appellant, )  
v. )  
SNOHOMISH COUNTY, )  
Respondent. )

SHB No. 85

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the request for review of appellant, D. D. Graham, of the denial of a shoreline management substantial development permit by respondent, Snohomish County, having come on regularly for hearing on the 29th day of September, 1975 in Everett, Washington, and appellant D. D. Graham appearing through his attorney, Edward D. Hansen, and respondent Snohomish County appearing through its attorney, Richard S. Lowry, Deputy Prosecuting Attorney, with Ellen D. Peterson, hearing examiner presiding, and the Board having either heard the testimony or

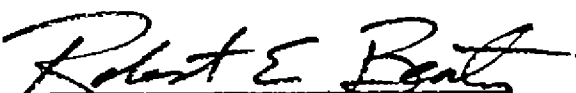
1 considered the record, and having reviewed the exhibits and post-hearing  
2 briefs herein, and having entered on the 23d day of February, 1976, its  
3 proposed Findings of Fact, Conclusions of Law and Order, and the Board  
4 having served said proposed Findings, Conclusions and Order upon all  
5 parties herein by certified mail, return receipt requested and twenty  
6 days having elapsed from said service; and

7 The Board having received no exceptions to said proposed Findings,  
8 Conclusions and Order and the Board being fully advised in the premises;  
9 now therefore,


10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed  
11 Findings of Fact, Conclusions of Law and Order dated the 23d day of  
12 February, 1976, and incorporated by this reference herein and attached  
13 hereto as Exhibit A, are adopted and hereby entered as the Board's  
14 Final Findings of Fact, Conclusions of Law and Order herein.

15 DONE at Lacey, Washington, this 19th day of March, 1976.

16 SHORELINES HEARINGS BOARD

17   
18 ROBERT E. BEATY, Member

19   
20 RALPH A. BESWICK, Member

21   
22 W. A. GISSBERG, Member

23   
24 ROBERT F. HINTZ, Member

25   
26 WALT WOODWARD, Member

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

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Mr. Richard S. Lowry  
Deputy Prosecuting Attorney  
Office of Snohomish County  
Prosecuting Attorney  
Snohomish County Courthouse  
Everett, Washington 98201

Mr. Edward D. Hansen  
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501 First National Bank Building  
Everett, Washington 98201

Mr. D. D. Graham  
336 N.W. 175th  
Seattle, Washington 98177

Snohomish County Commissioners  
Snohomish County Courthouse  
Everett, Washington 98201

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER 3

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SHORELINES HEARINGS BOARD  
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IN THE MATTER OF A SUBSTANTIAL )  
DEVELOPMENT PERMIT DENIED BY )  
SNOHOMISH COUNTY TO )  
D. D. GRAHAM, )  
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SHB No. 85

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

A hearing on the request for review of appellant, D. D. Graham, of the denial of a shoreline management substantial development permit by respondent, Snohomish County, was held in Everett, Washington, on September 29, 1975, before Board members, Ralph A. Beswick, Robert F. Hintz and Robert E. Beaty; Ellen D. Peterson, hearing officer, presided. Edward D. Hansen appeared as attorney for appellant, D. D. Graham; Richard S. Lowry, Deputy Prosecuting Attorney, represented the respondent, Snohomish County.

EXHIBIT A

1 Having either heard the testimony or considered the record, and  
2 having reviewed the exhibits and post-hearing briefs, the Board makes  
3 and enters these

4 FINDINGS OF FACT

5 I

6 The proposed project site is a shoreline of state-wide significance.

7 II

8 The proposed development would fill 11.5 acres of a twenty-acre  
9 site owned or under purchase contract by appellant. The site consists  
10 of two adjoining parcels of land located on the east bank of the main  
11 channel of the Snohomish River in Sections 21 and 28, Township 29 N,  
12 Range 5 E.W.M. The property includes the major portion of the 1930 Plat  
13 of River Front Tracts (hereinafter Area I) in addition to unplatted lar  
14 south of the state highway (Area II).

15 The site is located immediately upstream of the point of divergence  
16 of Steamboat and Union Sloughs and is directly east, across the  
17 Snohomish River, from the City of Everett. It is bisected east-west by  
18 two elevated trestles of state Route 2, a controlled access highway in  
19 this area. A Snohomish County dike, approximately 13 feet above mean  
20 sea level, partially surrounds the southern boundary of Area II.

21 III

22 Area I is zoned for rural use with a flood plain overlay  
23 (designation of flood hazard) and Area II is zoned agricultural with a  
24 flood plain overlay. The Snohomish County Comprehensive Plan, adopted  
25 in 1956, designates future use of the project site as agricultural. No  
26 draft master program was in existence at the time the permit was denied.

27 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 The project site has a history of industrial use but in recent  
2 years and prior to appellant's acquisition the site reverted to its  
3 present undeveloped state as marshland subject to periodic flooding.  
4 All of the property lies within the flood plain.

5 The topography varies from five to eleven feet above mean sea level.  
6 Vegetation and wildlife of Area I is that typical of marshland; Area II  
7 is almost entirely forested by large alder.

#### 8 IV

9 An application for a substantial development permit was filed by  
10 appellant with the Snohomish County Planning Department on November 9,  
11 1972. The project was described as a landfill of demolition, excavation,  
12 and river-dredge spoils materials. Proposed ultimate uses of the site  
13 included dryland log storage and dredge spoil transfer facilities. The  
14 fill of approximately 200,000 cubic yards would raise the site's  
15 elevation from 5-11 feet to 17 feet.

16 In March, 1973, a draft environmental impact statement (EIS), based  
17 in part on information supplied by appellant's engineer, was prepared  
18 and circulated by the Planning Department to city, county, and state  
19 agencies. A final EIS incorporating agency responses was completed  
20 prior to the Snohomish County Planning Commission's public hearing on  
21 the application, held May 22, 1973. Appellant's wife, engineer, and  
22 attorney testified at the public hearing on the project.

23 The Planning Commission found that the proposed development was  
24 inconsistent with the policies of the Shoreline Management Act (SMA)  
25 and guidelines promulgated pursuant thereto. It further found that the  
26 project would establish a precedent for industrial land use of the

27 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 Snohomish River Flood Plain and was contra to the purpose of the National  
2 Flood Insurance Program of encouraging the retention of flood-prone areas  
3 for open space. On the bases of these and other stated findings, on  
4 May 22, 1973, the Planning Commission unanimously recommended denial of  
5 the application to the Board of County Commissioners.

6 In a letter to the Board dated May 30, 1973, appellant challenged  
7 the Planning Commission's decision, requested a hearing before the  
8 Board, and asked to be notified of any public hearings held on the  
9 matter. Chapter 21.12 of the Snohomish County Code regulates the issuance  
10 of shoreline development permits. Section 21.21.090, "Duties of the  
11 Board," requires that if the Board alters any recommendation of the  
12 Planning Commission, it must conduct its own public hearing on the  
13 application. On June 11, 1973, at a public meeting, the Commissioners  
14 unanimously resolved to concur in all findings and recommendations of the  
15 Planning Commission and denied the application. Appellant timely  
16 filed his request for review of this decision on June 20, 1973.

17 V

18 The hearing on the merits of this matter was repeatedly continued  
19 at the request of both parties, pending completion of a study by the  
20 Army Corps of Engineers intended to designate the floodway for the  
21 lower Snohomish River. The study as received by Snohomish County on  
22 September 12, 1975, detailed four alternative floodway designations.  
23 Under three of the four alternatives, the project site was included within  
24 the floodway which would preclude any obstructive development on the  
25 property. Under alternative four, appellant's property would be located  
26 within the floodway fringe thus removing it from the proscription of

27 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 development thereon under the National Flood Insurance Program. The  
2 Corps study made no attempt to recommend to the County any one of the  
3 four alternatives, considering such designation a land use decision  
4 within the County's prerogatives. It was further elicited at hearing  
5 that the four alternatives were merely representative of an indefinite  
6 number of such floodway designation alternatives created by the River's  
7 multiple channel configuration.

## 8 VI

9 At a pre-hearing conference held in this matter on March 20, 1974,  
10 the parties stipulated that if the permit were to be granted, the project  
11 fill would consist solely of river-dredge spoils from the Corps of  
12 Engineers' dredging of the Snohomish River. Testimony at hearing  
13 indicated that (a) a need for additional river-dredge spoils sites for  
14 the lower Snohomish River does exist; (b) the Planning Department staff  
15 would continue to object to appellant's site for such spoils, and (c)  
16 at no time subsequent to the stipulation did the project as so modified  
17 come before the Snohomish County Planning Commission or the Board of  
18 County Commissioners for official review and action.

## 19 VII

20 Any Conclusion of Law hereinafter recited which should be deemed  
21 a Finding of Fact is hereby adopted as such.

22 From these Findings, the Shorelines Hearings Board comes to these

## 23 CONCLUSIONS OF LAW

### 24 I

25 The proposed project before this Board in terms of ruling on  
26 appellant's challenges to respondent's action is as the project was

27 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER



described at the time the Board of County Commissioners rendered its decision on the application, i.e., June 11, 1973.

## II

Appellant contends that "the procedures followed by Snohomish County in denying the appellant's permit application without a hearing constitute a denial of procedural due process." Neither the SMA nor the relevant guideline promulgated pursuant thereto (WAC 173-14-080) mandates local government to provide a public hearing prior to the issuance or denial of a permit. The guarantee of a public hearing under the Snohomish County Code in those instances where the Board of County Commissioners fails to agree with all the Planning Commission findings and recommendations is not applicable in this case. Appellant was in fact afforded an opportunity to present his views at the Planning Commission's public hearing and through this request for review, his case has again been publicly stated. Under these circumstances, the failure of the Snohomish Board of County Commissioners to hold its own public hearing on appellant's application does not constitute a denial of procedural due process.

## III

Appellant urges that the action of the Board of County Commissioners in denying the permit was an "arbitrary and capricious" decision based solely on the slanted findings and recommendations of the planning staff and commission. Appellant failed to meet its burden of proof as to the alleged characterization of the Planning Commission findings and recommendations. Further, the Board concludes that the action of the Board of County Commissioners was taken upon due consideration of the

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 facts upon which reasonable men could differ and was not arbitrary and  
2 capricious.

3 IV

4 Appellant invokes the appearance of fairness doctrine and argues that  
5 a violation of this doctrine occurred when the Board of County  
6 Commissioners failed to afford appellant a second hearing, thereby  
7 relying on the "strong" voices, the Planning Commission, to the exclusion  
8 of the "weak," the appellant Graham. The appearance of fairness  
9 doctrine as developed by the Washington courts is concerned with  
10 potential conflict of interest or impropriety on the part of reviewing  
11 officials. Its application to facts such as are alleged by appellant  
12 in this matter is an ill-founded extension of the doctrine.

3 V

14 Dredge river spoils were included as a proposed use in appellant's  
15 initial application. Therefore, respondent Snohomish County did have an  
16 opportunity to consider the effects of such a modified landfill and to  
17 issue a permit restricted accordingly.

18 The record now before this Board supports the respondent's failure  
19 to grant a permit for a landfill composed solely of river dredge spoils.  
20 In particular, although appellant did establish that a floodway could  
21 be designated in this area which did not include the subject site, no  
22 such designation has in fact been made. Until such designation is  
23 made, the filling of clearly potential floodway property is violative  
24 of the purposes of the Shoreline Management Act and cannot be  
25 condoned.

-6  
27 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

VI

Appellant submits that even if a permit is not granted, the project site falls within the ancient plat exemption of the Shoreline Management Act and no permit is required for the project.<sup>1</sup> Appellant did establish that the northerly parcel of the subject property, known as River Front Tracts (Area I) was platted prior to April 1, 1971, and that sales of such lots to appellant did occur prior to April 1, 1971.

Neither party specifically directed the Board's attention to condition (c) of the exemption. With regard to the initial proposal, the record itself is persuasive that all other requirements of the local agency would not be met. The record, however, does not conclusively rebut appellant's claim for an exemption with regard to the modified project.

Contrary to respondent's assumption with respect to subsection (e) of the exemption, appellant need not establish that his project would have been completed by June 1, 1973. Rather, for sites which otherwise

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1. "No permit shall be required for any development on shorelines of the state included within a preliminary or final plat approved by the applicable state agency or local government prior to April 1, 1971, if:

(a) The final plat was approved after April 13, 1961, or the preliminary plat was approved after April 30, 1969, or

(b) Sales of lots to purchasers with reference to the plat, or substantial development incident to platting or required by the plat, occurred prior to April 1, 1971, and

(c) The development to be made without a permit meets all requirements of the applicable state agency or local government, other than requirements imposed pursuant to this chapter, and

(e) The development is completed within two years after the effective date of this chapter." RCW 90.58.140(9).

1 qualify, the ancient plat exemption obviated the need to have a shore-  
2 line permit for developments thereon until June 1, 1973. No develop-  
3 ment could continue without a permit beyond that date.

4 In the instant matter, by tolling the statute on the date the  
5 application was filed, November 9, 1972, the appellant would have a  
6 maximum of seven months within which to fill on the site as stipulated.

7 The Board concludes that an exemption from the requisites of a  
8 shoreline permit apparently does lie for a fill of dredge river spoils  
9 on Area I for seven months. However, appellant is reminded that even  
10 where the ancient plat exemption applies, the project must be found to  
11 be consistent with the policies of the Shoreline Management Act.<sup>2</sup> It  
12 should further be noted that the Act grants to local governments the  
13 authority to enforce the provisions of the Act.<sup>3</sup>

#### 14 VII

15 Any Finding of Fact which should be deemed a Conclusion of Law  
16 is hereby adopted as such.

17 Therefore, the Shorelines Hearings Board issues this  
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20 2. "Exemption from the effect of the SMA of 1971 under  
21 RCW 90.58.140(9)(b)(c) applies only to permit require-  
22 ments of the Act by its terms; as limited, it does not  
extend to the policy provision in RCW 90.58.140(1)." Putnam v. Carroll, 13 Wn. App. 201, 204 (1975)

23 "Compliance with the policy of the Act is required of  
24 all projects, including those which do not require a  
permit." WAC 173-14-040.

25 3. RCW 90.58.210.

ORDER

The denial by the respondent Snohomish County Board of Commissioners of the substantial development permit sought by appellant, D. D. Graham, is affirmed.

DATED this 23rd day of February, 1976.

SHORELINES HEARINGS BOARD

Did not participate  
CHRIS SMITH, Chairman

Robert E. Beaty  
ROBERT E. BEATY, Member

Ralph A. Beswick  
RALPH A. BESWICK, Member

W. A. Gissberg  
W. A. GISSBERG, Member

Robert F. Hintz  
ROBERT F. HINTZ, Member

Walt Woodward  
WALT WOODWARD, Member